

Defendant.

1

This opinion assumes familiarity with the procedural history of this case and the evidence presented by the government at trial.

With respect to the issue currently before the court—that is, whether a forfeiture money judgment determination ought to be made the jury or the court—the government has indicated that it takes no position, but notes that district courts have differed on the issue. Defendant submits that it is appropriate for the jury to decide forfeiture issues under Rule 32.2 of the Federal Rules of Criminal Procedure.

DISCUSSION

The forfeiture judgment sought by the government is governed by 21 U.S.C. § 853 and Rule 32.2 of the Federal Rules of Criminal Procedure. Under Section 853, if a defendant is found guilty of any narcotics offense, the government may seize the property he derived from or used in the commission of that offense. 21 U.S.C. § 853(a)(1). Congress also authorized the government to seize “any other property of the defendant,” if by his act or omission the illicit property:

- (1) cannot be located upon the exercise of due diligence;
- (2) has been transferred or sold to, or deposited with, a third party;
- (3) has been placed beyond the jurisdiction of the court;
- (4) has been substantially diminished in value; or
- (5) has been commingled with other property which cannot be divided without difficulty.

21 U.S.C. § 853(p). “Property” includes money, real property, rights, interests, privileges, claims, securities, or tangible or intangible personal property. *See* 21 U.S.C. § 853(b). The statute thus provides for seizure of specific property derived from or used in connection with a narcotics offense, as well as, *inter alia*, forfeiture money judgments.

The United States Supreme Court has made it clear that criminal forfeiture under Section 853 is punitive, and that, as with sentencing, there is no constitutional right to a jury verdict on

forfeiture. *See Libretti v. United States*, 516 U.S. 29, 41, 49 (1995) (“[C]riminal forfeiture is an element of the sentence imposed for a violation of certain drug and racketeering laws.”); *see also Pacheco v. Serendensky*, 393 F.3d 348, 355 (2d Cir. 2004) (“The purposes of the criminal forfeiture statute [21 U.S.C. § 853] are to punish, deter, and disempower criminals.”) Section 853 was designed to enable the government to divest drug offenders of any proceeds derived from their wrongdoing, regardless of whether they tried to conceal their illicit assets before conviction. *See Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 641 (1989); *see also United States v. Ben-Hur*, 20 F.3d 313, 319 (7th Cir. 1994) (“[T]he purpose behind criminal forfeiture under [S]ection 853 is not just to sanction illegal conduct, but also to strip drug dealers of their economic power.”) (citations omitted). Forfeiture judgments involving purported income from drug activity or other illicit proceeds that the government cannot locate give the government leeway while staying true to the statutory purpose of forfeiture: stripping drug dealers of their economic power even if they have hidden the proceeds of their crimes prior to conviction. *See* 21 U.S.C. § 853(p); *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 641 (1989).

Like Section 853 and *Libretti*, Rule 32.2 treats forfeiture akin to sentencing, circumscribing the jury’s involvement in related determinations. “[T]he only issue for the jury in such cases would be whether the government has established the requisite nexus between the property [to be forfeited] and the offense.” Fed. R. Crim. P. 32.2(b)(4) Advisory Committee’s Note. Rule 32.2 provides:

As soon as practicable after a verdict of guilty . . . the court must determine what property is subject to forfeiture under the applicable statute. If the government seeks forfeiture of specific property, the court must determine whether the government has established the requisite nexus between the property and the offense. If the government seeks a personal money judgment, the court must determine the amount of money that the defendant will be ordered to pay.

Fed. R. Crim. P. 32.2(b)(1). The rule further provides that “[u]pon a party’s request . . . the jury *must* determine whether the government has established the requisite nexus between the property and the offense committed by the defendant.” *Id.* at (b)(4) (emphasis added). In sum, Rule 32.2(b)(4) expressly limits the role of the jury to an assessment of whether there is a nexus between a specific property and the crime. Fed. R. Crim. P. 32.2(b)(4).

The only determination that must be made when the government seeks a money judgment is the amount that the defendant will be ordered to pay. “[I]f the government does not seek specific property, but rather a personal money judgment, the court itself determines the amount of money that the defendant will be ordered to pay.” *United States v. Galestro*, 2008 WL 2783360, *11 (E.D.N.Y. July 15, 2008) (citing Fed. R. Crim. P. 32.2(b)(1)). “The defendant is not entitled to have the jury decide the amount of the forfeiture.” *Id.* (citing *United States v. Tedder*, 403 F.3d 836, 841 (7th Cir. 2005)).

Here, since the government is seeking a criminal forfeiture money judgment, there is no nexus determination to be made by the jury, and, therefore, defendant’s request for a jury verdict on forfeiture is denied.

CONCLUSION

For the reasons set forth above, defendant’s request is denied.

SO ORDERED

DATED: Brooklyn, New York
June 30, 2009

_____/s/_____
DORA L. IRIZARRY
United States District Judge